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## EU Citizenship and Withdrawals from the Union: How Inevitable is the Radical Downgrading of Rights?

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# EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?

Dimitry Kochenov

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# EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?

Dimitry Kochenov \*

## Abstract

What are the likely consequences of Brexit for the status and rights of British citizenship? Can the fact that every British national is an EU citizen mitigate the possible negative consequences of the UK's withdrawal from the EU on the plane of rights enjoyed by the citizens of the UK? These questions are not purely hypothetical, as the referendum on June 23 can potentially mark one of the most radical losses in the value of a particular nationality in recent history. This paper reviews the possible impact that the law and practice of EU citizenship can have on the conduct of Brexit negotiations and surveys the possible strategies the UK government could adopt in extending at least some EU-level rights to UK citizens post-Brexit. The high cost of such rights at the negotiating table is discussed against the general backdrop of the legal-historical analysis of the tradition of flexibility in citizenship and territorial governance which clearly emerges in EU law once the post-colonial context is considered in full. A particular emphasis is put on the possibility of negotiating post-Brexit bilateral free-movement arrangements with select Member States: a deeply problematic practice from the point of view of non-discrimination and the basic idea of European unity. Aiming to address the core issues of the role of EU citizenship in the context of withdrawals from the Union the conclusions of the paper, pointing to a quasi-inevitable overwhelming downgrade in citizenship rights for the withdrawing state, are applicable to any withdrawal context, not limited to the UK *per se*.

**Keywords:** Brexit, EU citizenship, non-discrimination, flexibility, free movement

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# EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?

## 1. Introduction and conclusion

This paper's objective is to provide a thick context to the analysis of the eventual role played by EU citizenship in the context of the eventual withdrawal of Member States from the European Union.<sup>1</sup> It thus does not concern itself with the issue of secessions of territories from the Member States as much,<sup>2</sup> which result in leaving a newly-formed state outside (or inside<sup>3</sup>) the European Union<sup>4</sup> – a matter meticulously analysed in the literature already.<sup>5</sup> A number of interesting issues arises, however, even when

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<sup>1</sup> Cf. Sionaidh Douglas-Scott, 'A UK Exit from the EU: The End of the *United Kingdom* or a New Constitutional Dawn?' (2015) Oxford Legal Studies Research Paper No 25/2015; Michael Keating, 'The European Dimension to Scottish Constitutional Change' (2015) 86 *The Political Quarterly* 208; Editorial Comments, 'Union Membership in Times of Crisis' (2014) 51 *Common Market Law Review* 1; Phedon Nicolaides, 'Withdrawal from the European Union: A Typology of Effects', 20 *Maastricht Journal* 2013, 209; Nicholas Forwood, 'Chinese Curses, Lawyers' Dreams, Political Nightmares and New Dawns: Interesting Times for the UK's Relationship with the EU' (2012) *Cambridge Yearbook of European Legal Studies* 83; Adam Łazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 *ELRev* 52.

<sup>2</sup> For an analysis of the factors connecting secessions and withdrawals, see, J.H.H. Weiler's chapter in Carlos Closa (ed.), *Troubled Membership: Dealing with Secession from a Member State and Withdrawal from the Union*, CUP, 2017 (forthcoming).

<sup>3</sup> Sionaidh Douglas-Scott, 'How Easily Could an Independent Scotland Join the EU?' (2014) *University of Oxford Legal Studies Research Paper* No. 46; D. Kochenov and M. van den Brink, 'Secessions from EU Member States: The Imperative of Union's Neutrality', *Edinburgh School of Law Research Paper* No. 2016/06.

<sup>4</sup> See, in general, Carlos Closa (ed.), 'Troubled Membership: Dealing with Secession from a Member State and withdrawal from the EU', (2014) *EUI Working Paper* 2014/91.

<sup>5</sup> See, most importantly, Daniel Kenealy and Stuart MacLennan, 'Sincere Cooperation, Respect for Democracy and EU Citizenship: Sufficient to Guarantee Scotland's Future in the European Union?' (2014) 20 *European Law Journal* 591; Phoebus Athanassiou and Stéphanie Laulhé Shaelou, 'EU Accession from Within? – An Introduction' (2014) 33 *Yearbook of European Law* 1; Phoebus Athanassiou and Stéphanie Laulhé Shaelou, 'EU Citizenship and Its Relevance for EU Exit and

one looks only at the citizenship issues related to the Member States planning to say goodbye to the journey in the unknown destination.<sup>6</sup> This is particularly so when the interplay of both the national and the supranational levels of citizenship is dynamically considered. Although my initial aspiration has been to provide a general analysis, on a number of occasions it has been impossible to overcome the temptation of referring to one specific Member State as an example: the United Kingdom. Whatever the outcome of the Brexit referendum, the example of the UK will remain sound, as it is specifically the UK, not any other Member State that triggered the whole debate on withdrawals from the EU. The discussion contained below, although written before June 23 2016 is thus as much connected to the UK specifically as it is of general application: the conclusions reached in this text are not at all country-specific. It is this possibility to extrapolate these to the situation of any other seceding Member State while simultaneously nodding in the direction of the cause of the conversation about the withdrawals we are having that makes me comfortable with the occasional use of the British example.

The key conclusion is very simple: the obvious loss of an overwhelming amount of rights by the citizens of the withdrawing state(s) aside (unless otherwise negotiated), EU citizenship as such cannot possibly affect, legally speaking, the regulation of withdrawals: Article 50 TEU does not contain any EU citizenship-related conditions and reading them into the text would not be legally sound:<sup>7</sup> EU citizenship is the crucial part of the EU package, the

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Secession', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: CUP, 2016.

<sup>6</sup> J.H.H. Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', 31 *Journal of Common Market Studies*, 1993, 417.

<sup>7</sup> Phoebus Athanassiou and Stéphanie Laulhé Shaelou, 'EU Citizenship and Its Relevance for EU Exit and Secession', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: CUP, 2016.

‘fundamental status of the nationals of the Member States’<sup>8</sup> in EU law. To impose it – and all the supranational law that comes with it – on a people of a Member State that has just voted precisely to leave the Union would be an aberration of common sense, since it will be a direct attack on the letter and purpose of Article 50 TEU, which, ultimately, leaves the precise conditions of withdrawal up to negotiators.

This being said, EU citizenship disapplication to the nationals of the withdrawing Member State has very far-reaching implications in terms of rights which should not be underestimated: a ‘full’ withdrawal would put the nationals of the withdrawing state into a worse position than the citizens of the third countries benefiting from non-discrimination clauses in the agreements with the EU.<sup>9</sup> This means that UK citizens in the EU would have a legal position inferior to Russians and Moroccans, besides losing all the well-known perks of EU citizenship ranging from free movement in the EU, non-discrimination on the basis of nationality within the scope of application of EU law, political rights at local and EP level in the country of residence, consular protection abroad via the representations of other Member States of the EU and others,<sup>10</sup> ultimately resulting in the reduction of fundamental rights, which are unquestionably connected to the status of EU citizenship.<sup>11</sup> Currently one of the top-quality nationalities in the world, UK citizenship will

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<sup>8</sup> *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* (C-184/99) [2001] E.C.R. I-6193; [2002] 1 C.M.L.R. 19 at [31]. See also, e.g. *Baumbast and R. v Secretary of State for the Home Department* (C-413/99) [2002] E.C.R. I-7091; [2002] 3 C.M.L.R. 23 at [82]; *Ruiz Zambrano* (C-34/09) [2011] 2 C.M.L.R. 46 at [41].

<sup>9</sup> As we have seen in *Simutenkov*, such clauses can have direct effect: Case C-265/03 *Igor Simutenkov* [2005] ECLI:EU:C:2005:213.

<sup>10</sup> See Part II TFEU.

<sup>11</sup> E. Sharpston, ‘Citizenship and Fundamental Rights – Pandora’s Box or a Natural Step towards Maturity?’, in P. Cardonnel, A. Rosas and N. Wahl (eds.), *Constitutionalising the EU Judicial System*, Oxford: Hart Publishing, 245; D. Kochenov, ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator’, in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: CUP, 2016, 1.



drop quite radically in quality after Brexit as a result of the loss of free movement rights in 27 Member States.<sup>12</sup>

Such situation is absolutely bound to have political implications, necessarily making the negotiators in charge of arranging the exact agreement behind leaving the Union mindful of the far-reaching nature of the losses in terms of rights that citizens are likely to experience in the cases of Member State(s) leaving. It seems it would be too cynical of the negotiators of the withdrawing state to assume that reducing UK citizens residing (or, importantly, wishing in the future to reside) in the other Member States to a status inferior to that of some third-country nationals with unprivileged relationship with the EU would be acceptable, even if this seems to have been the position of the British government and the British courts all along. Judges have argued, quite astonishingly, that UK citizens residing elsewhere in the EU cannot make a claim against disenfranchisement in the withdrawal referendum since they will not be more affected by the outcome than UK citizens residing in the UK.<sup>13</sup>

In other words, EU citizenship, while not really a 'force' (legally speaking at least) in the withdrawal context, is thus bound to play an important role politically. The key reason why is very simple: leaving the Union without negotiating any arrangement in terms of citizenship rights which would be either bilateral with the individual Member States of the EU or EU-oriented,

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<sup>12</sup> See, for a meticulous methodology of measuring nationality quality applied to all the nationalities in the world, D. Kochenov (ed.), *The Henley & Partners – Kochenov Quality of Nationality Index* (1<sup>st</sup> ed.), Zürich: Ideos, 2016 ([www.nationalityindex.org](http://www.nationalityindex.org)).

<sup>13</sup> *The Queen (on the Application of Harry Shindler MBE and Jacquelin MacLennan v. Chancellor of the Duchy of Lancaster and the Secretary of State for Foreign and Commonwealth Affairs)* [2016] EWCA Civ 469. The UK Supreme Court refused the permission to appeal on the grounds of purely UK law, leaving all the EU citizens of UK nationality who resided outside the UK using their EU free movement rights for 15 years or more disenfranchised in the Brexit referendum: UKSC 2016/0105.

resembling, for instance, the current framework of free movement of persons with Switzerland or the EEA,<sup>14</sup> will definitely result in an almost instant drastic free fall in the value of the nationality of the seceding state.<sup>15</sup> Post-secession citizenship will stop providing the holders with full access to the EU for work and residence, thus radically diminishing their horizon of opportunities, using Sen's language,<sup>16</sup> when compared with the pre-withdrawal time. EU citizenship's core value is precisely in the scale of rights which it provides, covering a number of states, rather than one.<sup>17</sup>

Reducing the scale of rights is bound to derail plenty of lives of those who relied on the pre-secession entitlements guaranteed by Part II TFEU, the citizenship Part, and EU law more broadly,<sup>18</sup> or were likely to benefit from such entitlements in the future. Crucially, while the comparison between the loss of rights experienced by the citizens of the withdrawing state on the one hand and the citizens of the other Member States on the other (so long as free movement and other EU-level rights will cease being provided in the territory

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<sup>14</sup> See The EEA Agreement (OJ 1997 L1/1); EC – Switzerland Agreement (OJ 2002 L114/6). Cf (on the EEA regime): Harvard Haukeland Fredriksen, 'Bridging the Widening Gap Between the EU Treaties and the Agreement on the European Economic Area' (2012) 18 ELJ 868; M Elvira Méndez-Pinedo, *EC and EEA Law: A Comparative Study of the Effectiveness of European Law* (Europa Publishing 2009); Carl Baudenbacher (ed), *Judicial Protection in the European Economic Area* (German Law Publishers 2012); Adam Łazowski, 'Enhanced Multilateralism and Enhanced Bilateralism: Integration Without Membership in the European Union' (2008) 45 CMLRev 1433; (on the EU-Swiss Agreement): Steve Peers, 'The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis' (2000) 2 EuJML 127; Marius Vahl and Nina Grolmund, 'Integration Without Membership: Switzerland's Bilateral Agreements With the European Union' (CEPS 2006); Francesco Maiani, Roman Petrov, and Ekatarina Mouliarova (eds), 'European Integration Without EU Membership: Models, Experiences, Perspectives' (2009) EUI Working Papers, RSCAS 2009/10, 103–135.

<sup>15</sup> See figure 1 for a graphic representation of the value of the UK nationality before and after the possible Brexit based on the *Quality of Nationality Index* methodology, *op cit*

<sup>16</sup> See, for the analysis of EU citizenship in such terms, G Palombella, 'Whose Europe? After the Constitution: A Goal-Based Citizenship' (2005) 3 *International Journal of Constitutional Law* 357. Cf. A Sen, *Development as Freedom* (OUP, 1999).

<sup>17</sup> D Kochenov, 'Member State Nationalities and the Internal Market: Illusions and Reality', in N. Nic Shuibhne and L.W. Gormley (eds.), *From Single Market to Economic Union*, Oxford: OUP, 2012.

<sup>18</sup> E. Sharpston, 'Citizenship and Fundamental Rights – Pandora's Box or a Natural Step towards Maturity?', in P. Cardonnel, A. Rosas and N. Wahl (eds.), *Constitutionalising the EU Judicial System*, Oxford: Hart Publishing, 245.

of the withdrawing state) could sound unjustified in terms of the sheer difference of scale between the two groups facing the unnecessary reduction of rights, it is necessary to take the loss of rights by the remaining EU citizens following the point of one state's withdrawal equally into account. From a purely pragmatic point of view it could be presented as a positive development, of course, that one is due to lose rights on either side, since when both parties are threatened with a loss, a more productive dialogue could be said to be more likely. This increases the chances of an amicable negotiated solution leading to the minimization of the loss of rights. The emphasis on rights is crucial in this respect, since the name of the legal status bringing the key rights is a contingency, of course: we can safely assume that the political logic of withdrawal under Article 50 TEU would demand dropping the pompous 'citizenship' label. Core EU citizenship rights can easily be provided without, however, to which the current position of Switzerland and the EEA countries vis-à-vis the EU clearly testifies.

At this point it is easy to guess the answer that this contribution will offer with respect to the key question which looms large in the context of the interplay of withdrawals from the Union and EU citizenship. The question is whether a dramatic loss of rights by the citizens on both sides of the newly-emerging EU border is an inevitable follow-up of a withdrawal of a Member State from the Union, or, alternatively, could some legal-political tools be found to avoid it? This question is obviously a tricky one. Any arrangement granting quasi-citizenship of the EU to the citizens of the Member State withdrawing from the Union will de facto result in affecting negatively the core considerations behind wanting to withdraw – whatever these can be – thus openly playing against the objective, which such a withdrawal is seeking to achieve. The resulting political balance here can be very tricky: how much can real and tangible rights of the withdrawing state's own citizens be cut in

the name of the goals its withdrawal is aiming to achieve (however arcane these goals could seem)? This balance will be for the politicians of the withdrawing state to try to execute, keeping in mind that maintaining an EEA-like arrangement with the EU in the context of the free-movement of persons will obviously have a price at the negotiating table. This price will necessarily include reciprocal arrangements for EU citizens in the withdrawing Member State or other important concessions necessarily and obviously limiting the effects of withdrawal from the Union. Besides depending on the negotiating position of the other party, such balancing will be bound by a full realization that whatever outcome is reached, it is bound to disappoint some part of the citizenry, should a 'true withdrawal' be promised. It comes handy in this regard that the negotiated solution is what Article 50 TEU precisely requires. It can thus be safely assumed that leaving the EU is not a yes/no question. Moreover, as will be shown below, the Union legal history offers a wide palette of examples of a truly far-reaching recourse to flexibility in terms of organizing the territorial and substantive reach of its law, including within and outside the territory of the Member States.

Choosing a bilateral approach implies potentially significant costs in terms of the fragmentation of the current free movement space. Not a surprising outcome, one might argue, should the withdrawal decision be taken. While negotiating with the remaining Member States collectively will most likely make it impossible for the seceding state to discriminate between the nationals of the remaining Member States: indeed, they would be prevented from adopting such a position in the light of the core principles of EU law, bilateral negotiations are likely to be a totally different story. The best meeting of minds could easily imply maintaining full free-movement arrangements bilaterally only with the Member States where the majority of the expats of the withdrawing states reside, plus, perhaps, the most economically

successful Member States of the EU, thus dropping all but a handful of the Member States, arguing that these are anyway of little interest for the citizens of the withdrawing Member State in terms of settlement and work opportunities. This approach is bound to be put on the table in any bilateral setting, given the clear mono-dimensionality of the flows of free movement of labour in the EU. It is not that UK citizens are all packing up to go to Slovakia or Bulgaria. The contrary is true. Dropping much of Eastern and some of Southern EU from the free movement arrangements under the withdrawal agreement could thus be presented by the negotiators as a reasonable way forward, to strike the right balance between the political goal of secession and the need to make sure that own citizens of the seceding state do not suffer a really serious blow to their rights.

The consequences for the Eastern European citizens residing in the UK under EU law, should such an approach be chosen, could be drastic indeed, a valid reason to prefer a strictly multilateral approach and a built-in legal guarantees in the final arrangement, against any such bilateral moves in the future. Limiting free movement uniquely to the nationals of the richest Member States or the Member States where British citizens are most represented is obviously a serious blow to the current regime, excluding the periphery at a much more dramatic scale than what is now the case in the context of EU law, which tends to favour the centre both structurally and as applied.<sup>19</sup>

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<sup>19</sup> In its current form the EU is persuasively criticised for not paying attention to the periphery: Damjan Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the *Status Quo*', in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds.), *Europe's Justice Deficit?* (Hart Publishing 2015) 319. The exodus of population from Lithuania or Latvia to the West European Member States is thus not necessarily a success of EU's policy, showing, only, how harsh the effects of the economic disparities can be between the Member States and that not enough is done to ensure uniform development of all the Member States of the Union: F.G. Nicola, 'Conceptions of Justice from Below', in D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe's Justice Deficit?*, Oxford: Hart Publishing, 2015, 349.

Lastly, the number and nature of the possible legal-political issues arising in the context of the organization of withdrawals is so large and diverse that this brief text can only aspire to touch upon the most important ones, unable to provide a truly encyclopædic treatment of this important topic. It is the author's hope, however, that this sketch will nevertheless be helpful for the understanding of the core underlying factors influencing the interaction of secessions from the Union with EU citizenship.

The analysis proceeds as follows. It first briefly sketches the contours of the intimate relationship between citizenship and territory, looking both at the national and the supranational levels of this legal relationship. This relationship appears to be much less straightforward than what many politicians and tabloid writers would like to believe. The argument then moves on to demonstrate that the issue of permutations of statehood among the Member States of the EU is not as exceptional and rare as the literature sometimes tends to assume.<sup>20</sup> The Union, however surprising this might seem to some, has always been overwhelmingly flexible at its essence. This flexibility is bound to manifest itself at its strongest in the context of the withdrawal negotiations under Article 50 TEU. Having tapped into the history and core building block of the existing tradition of flexibility, this contribution puts the emphasis on the consequences of constitutional territorial permutations for the enjoyment of supranational rights in the Union.

The last section before the concluding question of how to organize the post-withdrawal free movement of citizens best deals with the political

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<sup>20</sup> The starting part of this section relies on D. Kochenov and M. van den Brink, 'Secessions from EU Member States: The Imperative of Union's Neutrality', *Edinburgh School of law Research Paper* No. 2016/06.

implications of the EU citizenship / EU membership story in the context of leaving the Union. It is in the realm of the political negotiations, not legal battles, as the UK Supreme Court has recently directly confirmed.<sup>21</sup> It is fundamental to realise, however, that for the reasons explained above, EU citizenship and the rights associated therewith is likely to play the most important role in the context of withdrawals from the Union. In terms of the limits of the political possibilities the answer is quite simple: anything is possible, the preservation of the EEA-like free movement regime between the EU and the withdrawing state to the bilateral arrangements between the withdrawing state and the Member States of its choice following the withdrawal. Cutting any forms of free movement is an extreme, and thus politically virtually unfeasible option. Allowing for a broad margin of appreciation is particularly sound, given the general context of flexibility of citizenship, nationality, territory, and rights arrangements that the EU has to offer in the context of constitutional change (including, necessarily, its own). A number of important factors is bound to be taken into account as leaving the Union is negotiated. A brief comparison will be made with the core (EU) citizenship options available to the newly-formed states emerging as a result of secessions from the Member States and eager to keep the status of EU citizenship for their populations.

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<sup>21</sup> UKSC 1016/0105, 24 May 2016.



## 2. Citizenship and territory: an intimate relationship

Citizenship, as ‘an instrument and object of ... closure,’<sup>22</sup> is naturally and intimately connected to territory. This connection is visible in particular through some modes of citizenship acquisition that are essentially territorial<sup>23</sup> as well as a usual linkage of citizenship as a legal status of belonging, or a mode of contestation,<sup>24</sup> to a particular public authority, which is usually territorial in essence.<sup>25</sup> Classical understandings of a state in legal literature make both citizenship and territory indispensable elements of statehood, which necessarily connects the two. Any mutation of the legal status of the territory can thus naturally be expected to have consequences for the citizenship status of (at least some of) the inhabitants. Crucially, the core right of any citizenship relates to the ability to enter the territory the status is associated with and remain there free of any border controls – a principle recognized in international and EU law.<sup>26</sup>

EU citizenship, although highly atypical compared with the nationalities at the Member State level,<sup>27</sup> is nevertheless informed by the same territorial

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<sup>22</sup> R Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge MA, Harvard University Press, 1992), 23.

<sup>23</sup> See, e.g. I. Honohan, ‘The Theory and Politics of *Ius Soli*’, EUI RSCAS Paper (EUDO Citizenship), 2010, available at: <http://eudo-citizenship.eu/docs/IusSoli.pdf>. This crucial legal status is distributed in a manner akin to a lottery, where the place of birth and the nationality of parents are the two factors at play: Aylet Shachar, *Birthright Lottery: Citizenship and Global Inequality*, Cambridge, MA: Harvard University Press, 2009.

<sup>24</sup> E.g. Engin Isin, ‘Citizenship in Flux: The Figure of the Activist Citizen’, 29 *Subjectivity*, 2009, 367.

<sup>25</sup> Charles Tilly, *Coercion, Capital and European States: AD 990–1992* (2<sup>nd</sup> ed.), London: Wiley Blackwell, 1992.

<sup>26</sup> C-434/09, *McCarthy*, EU:C:2011:277, [2011] ECR I-3375.

<sup>27</sup> For overviews, see, e.g. J Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’ in P Craig and G de Búrca (eds), *Evolution of EU Law* (OUP 2011 2nd ed) 578; D. Kochenov, ‘The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate’, 62 *International and Comparative Law Quarterly*, 2013, 97.



logic.<sup>28</sup> Its core rights are to be enjoyed in the territory of the Union<sup>29</sup> and the fundamental rules of its acquisition are also frequently *de facto* territory-related: the *ius tractum* logic of becoming a European citizen – the derivative nature of its acquisition<sup>30</sup> – simply relies on the Member States' own determinations of who their nationals are,<sup>31</sup> with only minor derogations aiming at the protection of EU-level citizenship rights and the enjoyment of supranational personal legal status in full,<sup>32</sup> as well as protection of citizens against discrimination on the basis of the mode of citizenship acquisition.<sup>33</sup> In essence, however, any citizenship, including the one of the EU, functions in exactly the same way, allowing the polity in charge of the status essentially to draw a line between those, who 'belong' and those who do not, thus using the status to take informed and predictable decisions about the individual entitlements of every person holding the status (or not) *vis-à-vis* the public authority.<sup>34</sup>

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<sup>28</sup> T. Pullano, *La citoyenneté européenne: Un espace quasi étatique*, Paris: SciencesPo, 2014; L. Azoulay, 'Transfiguring European Citizenship: From Member State Territory to Union Territory', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: CUP, 2016.

<sup>29</sup> Although the Treaty formulation rather points to the sum of the territories of the Member States, the concept of the Union territory is maturing very fast in the case-law of the ECJ, playing an important role. L. Azoulay, 'Transfiguring European Citizenship: From Member State Territory to Union Territory', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: CUP, 2016.

<sup>30</sup> D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', (2009) 15 *Columbia Journal of European Law* 169.

<sup>31</sup> Art. 1, *Convention Governing Certain Questions Relating to the Conflict of Nationalities*, (12 April, 1930), 179 L.N.T.S. 89, 99. This position is also confirmed by the fact that the Court respects the Declarations made by the Member States in clarifying the meaning of their nationalities in the context of EU law. See Case C-192/99, *Kaur* EU:C:2001:106, [2001] ECR I-1237. Cf. A. Sironi, 'Nationality of Individuals in Public International Law: A Functional Approach', in A. Annoni and S. Forlati (eds.), *The Changing Role of Nationality in International Law* (Abingdon: Routledge, 2014), 54.

<sup>32</sup> *Rottmann* C-135/08, EU:C:2010:104. For an analysis, see, D. Kochenov, 'A Real European Citizenship: A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe' (2011) 18 *Columbia Journal of European Law* 56, 77.

<sup>33</sup> Case C-214/94 *Boukhalfa* [1996] ECR I-2253. Similar logic applies to the discrimination based on residence outside in a particular territory outside the EU: C-300/4, *Eman and Sevinger*, EU:C:2006:545, [2006] ECR I-8055. Cf. Leonard F.M. Besselink, *Annotation of Case C-145/04 Spain v. U.K., Case C-300/04 Eman en Sevinger, and ECt.HR Case Sevinger and Eman v. The Netherlands*, 45 CMLRev. 787 (2008).

<sup>34</sup> Christian Joppke, *Citizenship and Immigration*, Oxford: Polity Press, 2010.

This picture is obviously too simplistic to reflect reality in full. While a notable connection between citizenship and territory is always there, the two function in radically different realms and frequently do not overlap in practice. In a metaphor effectively deployed by Rainer Bauböck, if political maps of the world would be drawn to show the citizenship of each individual in the territory of each of the states, rather than simply colouring state territory in a corresponding colour, the resulting picture will be a pixelated representation of an intricate reality that will show with clarity how citizenship and territory actually do not overlap.<sup>35</sup> This is an important point, which plenty of thinkers, including T.H. Marshall, ignored: the world is much more interesting than what the official statist representations would like to make of it.<sup>36</sup>

When speaking about withdrawals, it is absolutely necessary to have both pictures in mind. The dominant one, drawing a clear and idealistic line between citizenship and territoriality on the one hand and a less clean pixelated world, which Bauböck had in mind, on the other. Importantly, both will inform the thinking about the potential influence of citizenship on the organization and outcomes of withdrawals of Member States from the Union. In other words, citizenship rights, including the core ones, such as voting, can have a significant role to play outside the territory,<sup>37</sup> while plenty of those who are present in the territory will not enjoy the plenitude of rights enjoyed

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<sup>35</sup> Rainer Bauböck, 'Citizenship and National Identities in the European Union' (1997) *Jean Monnet Working Paper* (Harvard Law School) No. 97/04.

<sup>36</sup> Marshall, T.H., 'Citizenship and Social Class', in T.H. Marshall, *Citizenship and Social Class*. London: Pluto Press 1992 [1950].

<sup>37</sup> Heather Lardy, 'Citizenship and the Right to Vote', 17 *Oxford Journal of Legal Studies*, 1997, 75; Ruth Rubio-Marín, 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants', 81 *New York University Law Review*, 2006, 117.

by the majority of citizens, even though the discrepancies here are thinning away very fast.<sup>38</sup>

Given that EU citizenship is not that different, as a legal status, from the nationalities of the Member States from which it derives, it is similarly as non-territorial in essence, as it is connected to the territory. Crucially, while the majority of rights are then only available in the Union as such – including the rights to work, to reside, etc. – the possession of the status of citizenship as such is non-territorial. The intricate unsustainability of the arrangements related to the non-application of EU law in the Færøe Islands in terms of, in particular, the personal scope could help to illustrate this basic point. When acceding to the Communities the Danish government clarified, that the ‘Danish nationals in the Færøe Islands’ will not be considered ‘nationals for the purposes of Community law’.<sup>39</sup> Yet, given that this limitation was merely territorial, there is no evidence that it has in any way affected the enjoyment of EU citizenship by the Færøe Islanders, as long as they do not travel on the green Færøe model of the Danish passport, which they can, but are not obliged to request.<sup>40</sup> Any territorial limitation of the status of citizenship

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<sup>38</sup> Joppke, Christian, ‘The Inevitable Lightning of Citizenship’, 51 *Eur. J. Sociology*, 2010, 37.

<sup>39</sup> Protocol No. 2 to the Act of Accession, Relating to Færøe Islands, art. 4, 1972 O.J. (L 73) 163. The Islands are not part of the Union under Art. 355(5)(a) TFEU. Cf. N. Fagerlund, ‘Autonomous European Island Regions Enjoying a Special Relationship with the European Union’ in L. Lyck (ed.), *Constitutional and Economic Space of the Small Nordic Jurisdictions* (Copenhagen: NordREFO, 1996), pp.90–112

<sup>40</sup> Færøe Islands is not the only example of a Member State territory that never fell within the territorial scope of EU law. Other examples include, *inter alia*, Macao, Hong Kong (Brian Hook and Miguel Santos Neves, ‘The Role of Hong Kong and Macau in China’s Relations with Europe’ (2002) 169 *The China Quarterly* 108), Suriname (which decided not to join the Communities when the Netherlands Antilles asked to be included as Overseas Countries or Territories (JO 2413/64)), UK Sovereign Base Areas in Cyprus (SBAs) (Art. 355(5)(b) TFEU; S Lahlé-Shaelou, ‘The Principle of Territorial Exclusion in the EU: SBAs in Cyprus – A Special Case of *Sui Generis* Territories in the EU’ in D Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International 2011) 153). Some did join at a later stage compared with the ratification of the Treaties by their ‘mother country’. The examples include the former Netherlands Antilles (See, de Overeenkomst tot wijziging van het Verdrag tot oprichting van de Europese Economische Gemeenschap ten einde de bijzondere associatieregeling van het vierde deel van het Verdrag op de Nederlandse Antillen te doen zijn of 13 November 1962, JO 2413/64, 1964) and Canary Islands (See, Council Regulation (EEC)

clearly does not work. Moreover, EU law makes clear that some rights of EU citizenship which are not territorial *per se* and can thus be enjoyed outside EU territory, such as the general principle of non-discrimination, equally apply to all EU citizens of particular nationality residing outside of the territory of the EU.<sup>41</sup> The same cannot be said of the most important, territorial rights, which cannot be enjoyed by EU citizens outside of the territory of the Union, be it in the Færø Islands, Socotra, Aruba, or Koh Samui.

In order to come to a conclusion which right of EU citizenship will be operational outside of the Union territory and which not, it is necessary to go right by right, conducting individual analysis. It is clear that once a Member State withdraws, the majority of supranational rights enjoyed by EU citizens in its territory will by definition disappear in thin air, unless otherwise negotiated, since the national territory will not anymore make part of the territory of the Union. EU law as such cannot possibly limit the principle of its own non-application in the territory of the withdrawing state, since there is no indication to this effect in Article 50 TEU. There is an important footnote to be made here, however: while Article 50 TEU does not make it impossible for the Member State willing to withdraw to abandon all of the *acquis* of the Union – indeed, this is what ‘withdrawal’ means when approached purely linguistically – questions are bound to arise, should the withdrawing state be willing to retroactively terminate the rights enjoyed by EU citizens connected with other Member States in its own territory. *Ratione temporis* of the law will be of crucial importance. It is absolutely clear that an argument that their rights simply expire will not hold, since withdrawal cannot possibly amount to a retroactive annulment of all the EU law-inspired national legislation and

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1911/91 of 26 June 1991 on the application of the provisions of Community law to the Canary Islands, OJ L [1991] 171/1).

<sup>41</sup> C-300/4, *Eman and Sevinger*, EU:C:2006:545, [2006] ECRI-8055.

regulations. In the case of the UK this means that the EU Citizens Free Movement Directive, as implemented in national law, will no doubt continue applying until the time it is expressly overruled. Moreover, such overruling will have to comply with the national constitutional requirements of legal certainty, the protection of human rights and the rule of law. The same applies to countless other instruments. Arguing to the contrary would imply arguing for a complete chaos supplanting the law, given the depth of the interpenetration of national and European at this stage. In other words, the drastic consequences of withdrawals for the rights of EU citizens, while absolute for those who have not used those rights yet, are in all likelihood somewhat tamed in the case of those who already reside across the newly-emerging EU border. Ultimately, however, this issue is bound to be one of the core aspects of the political negotiations under Article 50 TEU.

Unlike the non-application of EU law and rights to the territory of the seceding state post-secession, the contrary is true with regard to the status of EU citizenship: all those holding EU citizenship acquired on the basis of a connection with any of the Member States but the withdrawing one will keep their status and will be able to enjoy the plenitude of rights connected to it, once returning to the territory of the Union (while being able to enjoy non-territorial rights in the withdrawing state itself). This very basic understanding is behind the rising numbers of UK citizens wishing to acquire an Irish nationality, to which many of them are entitled by law.<sup>42</sup>

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<sup>42</sup> The Irish are not even foreigners in the UK, under UK law: Electoral Administration Act, 2006, c. 22, § 18(1)(b) (Eng.); Representation of People Act, 2000, c. 2, § 6(3)(e) (Eng.).

### 3. The tradition of EU flexibility in dealing with territorial and citizenship changes

Recent European constitutional history teaches us the lesson of flexibility of the legal arrangements in many of the cases when the boundaries of territory and belonging have been redrawn and the status of citizenship, including the ability to benefit from supranational rights, has been affected. This flexibility definitely includes EU law and international law: from citizenship rules, where the EU simply follows pretty much *any* approach adopted nationally,<sup>43</sup> to adaptations to the unique circumstances of each particular case: Estonia and Latvia refusing to recognize large shares of their population based on the state territory as citizens, triggering EU-level non-recognition of their EU-level rights claims,<sup>44</sup> just as the adaptations of the pre-accession regime to accept divided Cyprus, in ephemeral control of the island, including full EU citizenship for the Turkish Cypriots qualifying for the status under the law of the Republic although residing in the occupied territories,<sup>45</sup> are the cases in point. These lessons should be taken into account in full while interpreting the limits of the Treaties in dealing with secessions, withdrawals and accessions: both the understandings of ‘citizenship’ and that of ‘territory of a Member State’ are malleable.<sup>46</sup> In the context of withdrawals from the EU this

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<sup>43</sup> EU law honours the Member States’ determinations, for instance, of nationality for the purposes of EU law, which implies that non-nationals of the Member States could be considered EU citizens and vice versa, some nationals could be considered non-EU citizens. The German and the UK approaches to citizenship are particular cases in point, both tolerated by EU law: Case C-192/99, *The Queen v. Sec’y of State for the Home Dep’t ex parte Manjit Kaur*, 2001 E.C.R. I-1237, para. 27.

<sup>44</sup> For a detailed analysis of this particular issue, see, e.g., Dimitry Kochenov and Aleksej Dimitrovs, ‘EU Citizenship for the Latvian “Non-Citizens”: A Concrete Proposal’ (2016) 37 *Houston Journal of International Law* 1.

<sup>45</sup> Elena Bashkeska and Dimitry Kochenov, ‘Thanking the Greeks: The Crisis of the Rule of Law in EU Enlargement Regulation’ (2015) 39 *Southeastern Europe* 392.

<sup>46</sup> Numerous other examples can be given, ranging from special treatment of the belonger status of the Åland Islands to Saami agriculture protocols and the limited EU citizenship rights of Manxmen and the Channel Islanders aimed at the preservation of their autonomy and specificity.

would not amount to much, however, besides making the EU tolerate a more extensive policy of naturalization of the citizens of the withdrawing state by other Member States of the Union, like the Irish-British example referred to above.<sup>47</sup> Very much can be done in terms of framing national citizenship of a Member State and connecting or, eventually, disconnecting it from the EU citizenship status, as the practice shows.<sup>48</sup> All in all, regrettably, one can state that more than twenty years of EU citizenship practice<sup>49</sup> have not altered the day-to-day reality of nationalism and harmful and irrational citizenship regulation in Europe. Citizenship wars rage in the East of the continent – with the latest example coming from Slovakia, eager to deprive of its nationality its own citizens of Hungarian ethnicity willing to accept Hungarian nationality;<sup>50</sup>

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See, on the Isle of man and Channel Islands UK citizenship status and EU rights: Documents Concerning the Accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, Protocol No. 3, Mar. 27, 1972, 1972 O.J. (L 73) 164; see also K.R. Simmonds, *The British Islands and the Community: I—Jersey*, 6 CMLRev. 156 (1969); K.R. Simmonds, *The British Islands and the Community: II—The Isle of Man*, 7 CMLRev. 454 (1970); K.R. Simmonds, *The British Islands and the Community: III—Guernsey*, 8 CMLRev. 475 (1971); On the Åland Islands belonging status: D. Kochenov, 'Regional Citizenships and EU Law', 35 ELRev. 2010, 307; N. Fagerlund, "Chapter 9: The Special Status of the Åland Islands in the European Union" in Lauri Hannikainen and Frank Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe* (The Hague: Kluwer Law International, 1997), p.189 On the Saami territoria/legal status arrangements: Perrot and Miatti, "Les lapons et les îles Åland dans le quatrième élargissement" (1997) 413 *Revue du marché commun et de l'Union européenne* 670,

<sup>47</sup> There is a consensus in the literature that naturalising excessively large numbers of people at once could amount to a breach of EU law due to possible negative externalities for the other Member States. The exact threshold to understand when this rule is applicable is relatively high, however. Even naturalising 1.000.000 foreigners abroad over ten years, as Italy has done in Argentina, seems to be fully legal and has not caused any criticism, while smaller scale naturalisations in Bulgaria (as applied to Macedonians) and Romania (as applied to Moldovans) not infrequently receive negative press, supplying a clear example of dual standards in the EU. Given that a million per ten years is clearly acceptable, however, one could doubt if Ireland, in one example, could naturalise *all* the willing population of the UK without breaching EU law. Important in this context is that the ECJ consistently ignores involuntary naturalisations: Case 21/74, *Jeanne Airola v. Comm'n* [1975] E.C.R. 221.

<sup>48</sup> The ability to disconnect Member State nationality from EU citizenship, although confirmed in *Kaur*, is much more difficult for the Member States to use after *Rottmann*, which is a positive development, as it reduces the likelihood of invoking the right to bring unilateral declarations on the meaning of nationality for the purposes of EU law by the Member States wishing to deprive of rights certain minority groups among their citizens.

<sup>49</sup> A. Wiener, 'Going Home? "European" Citizenship Practice Twenty Years after', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: CUP, 2016.

<sup>50</sup> Jose-Maria Araiza, 'Good Neighbourliness as the Limit of Extra-territorial Citizenship: The Case of Hungary and Slovakia', in Dimitry Kochenov and Elena Basheska (eds), *Good Neighbourliness in the European Legal Context* (Brill-Nijhoff 2015).



at a more general level, and notwithstanding the global trends,<sup>51</sup> multiple nationality is not yet accepted everywhere across the EU. Limitations can apply even to the cumulation of Member State nationalities.<sup>52</sup>

Such negative examples notwithstanding, it is beyond any doubt that EU's citizenship and territorial evolution has been particularly eventful over the last half a century. More than half of what used to be the founding Member States' territory has left their sovereignty since the creation of the European Communities.<sup>53</sup> Moreover, a significant number of the Member States of the EU are direct products of recent permutations of statehood, some of them gaining statehood with the clear support of the Union.<sup>54</sup> The same applies to some candidate countries.<sup>55</sup> Constitutional permutations of territory and, consequently, of citizenship, are thus quite common in the European context.

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<sup>51</sup> P. Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship*, New York, NY: NYU Press, 2016.

<sup>52</sup> D. Kochenov, 'Double Nationality in the EU: An Argument for Tolerance', 17 *ELJ*, 2011, 323.

<sup>53</sup> Besides of course Algeria which was fully incorporated into the French Republic at the inception of the Communities and the Netherlands East Indies and New Guinea, the Member States possessed a variety of territories around the world and it was not the intention of the Communities to let these territories go. Indeed, their incorporation into the internal market in the mid- to long-term future was a crucial condition for the French participation in the European integration project: D Custos, 'Implications of the European Integration for the Overseas' in D Kochenov (ed), *EU Law of the Overseas* (Kluwer Law International 2011) 91. Following Ziller's helpful compilation, the Member States' territories then included: the Belgian territories of Congo and Rwanda-Burundi, Italian protectorate of Somalia, to the Netherlands New Guinea, and to the French equatorial Africa (Côte-d'Ivoire, Dahomey, Guinea, Mauritania, Niger, Senegal, Sudan, and Upper Volta), French East Africa (Moyen-Congo (the future Central African Empire beloved by Giscard d'Estaing), Gabon, Oubangui-Chari and Chad), protectorates Togo and Cameroon, Comoros Islands (Mayotte, separated from them is now an outermost region of the EU), Madagascar, Côte Française des Somalis. Following the UK accession, the list of the associated countries and territories became much longer, including (besides the countries and territories still on the list) Bahamas, Brunei, Caribbean Colonies and Associated States (Antigua, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, St. Vincent and Anguilla, British Honduras), Gilbert and Ellis Islands, Line Islands, the Anglo-French Condominium of the New Hebrides, Solomon Islands, and Seychelles. J Ziller, 'L'Union européenne et l'outre-mer', 113 *Pouvoirs* 145, 146–47 (2005).

<sup>54</sup> Which is attested, for instance, by the work of the Badinter Commission: Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008).

<sup>55</sup> In one example, it was due to the EU's efforts that a deal laying down the rules of the Montenegrin independence referendum was brokered between the pro- and anti-independence movements. Following EU recommendations, it was decided that for independence to be gained, a 55% majority was required. For a detailed analysis of the negotiations see: Karsten Friis, 'The Referendum in Montenegro: The EU's "Postmodern Diplomacy"' (2007) 12 *European Foreign Affairs Review* 67.



The problems which secessions pose to citizenship at the national level<sup>56</sup> are very similar to the problems posed by withdrawals from the EU in the context of EU citizenship at the supranational level. Both levels clearly enjoy both elements of the citizenship / territory equation, even if the supranational level is somewhat more complex due to the constant reliance on the determinations of territoriality and also citizenship made by the constituent parts of the Union – the Member States – under their own law. This being said, also the contrary could be said to be true: in the case of withdrawals from the EU the nationality of the population of the withdrawing entity is already clearly predetermined by its own constitutional law, which is not the case when states split. In other words, while the EU situation is relatively more complex, when compared to the splitting of states, it is at the same time also simpler, since there is no need, in the context of the secessions from the EU, to articulate an entirely new status of citizenship.

Since history knows no examples of withdrawals from the EU – and those who cite Greenland are obviously wrong, since it is still part of an EU Member State and Parts IV, II, and many other provisions of TFEU (to say nothing about secondary law) applies there, so Greenland has never ‘left’,<sup>57</sup> – it is most logical to approach secessions from the Member States as a parallel to the story of possible withdrawals from the Union. After all, a full secession – not a half-way devolution, like in the case of Greenland or St Pierre-et-

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<sup>56</sup> See Jo Shaw’s chapter in Carlos Closa (ed.), *Troubled Membership: Dealing with Secession from a Member State and Withdrawal from the Union*, CUP, 2017 (forthcoming).

<sup>57</sup> Treaty amending, with regard to Greenland, the Treaties establishing the European Communities [1985] OJ L 29/1 (The Greenland Treaty); Friedl Weiß, ‘Greenland’s Withdrawal from the European Communities’ (1985) 10 *European Law Review* 173. ‘Leaving’ is not a correct characterisation of this treaty’s key legal effect: Greenland simply changed its status under the Treaties, becoming an Overseas Country or Territory in the sense of Annex II, which means that a lot of EU law applied there.

Miquelon<sup>58</sup> – necessarily results in a full disapplication of supranational law to the territory in question, including the provisions on the personal legal status recognized by the supranational legal level. This is exactly the maximum outcome of any withdrawal under Article 50 TEU. In this sense, taking Article 50 TEU seriously to heart – as a lawyer should – will produce the result akin to Algeria’s withdrawal from the EEC as a result of leaving France – all the Algerians losing the status of Member State nationals for the purposes of Community law as a result of this move.<sup>59</sup>

The example of Algeria is both exceptional and not. Although not characterized as a colony in French law, legitimate claims can be made that *de facto* it *was* one, thus joining the chorus of other colonial possessions, leaving the sovereignty of their ‘mother countries’ and also cutting citizenship ties with the Member State in question and with the EEC. Remember the *Eurafrican Union*<sup>60</sup> and look at the contemporary maps: from Vanuatu to Congo, from Somalia and Suriname, European sovereignty has receded, bringing with it new, local, citizenship statuses for the majority of the former colonial subjects of different kinds, some of them enjoying full citizenship of

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<sup>58</sup> France claimed to have changed the status of the territory unilaterally on a number of occasion. It is not entirely clear whether such unilateral change (which was entirely in line with the Treaty text at the time) actually resulted in a difference in treatment vis-à-vis the Communities. The Commission claimed it did: Written Question No. 400/76 by Mr. Lagorce to the Commission concerning the situation of the islands Saint-Pierre-and-Miquelon [1976] OJ C 294/16, para. 1.

<sup>59</sup> Algeria was fully incorporated first following the formation of the Second Republic (1848). Guy Pervillé, ‘La politique algérienne de la France, de 1830 à 1962’ (1997) 32 *Le Genre humain* 27; P Laffont, *Histoire de la France en Algérie* (Plon 1979).

<sup>60</sup> Peo Hansen and Stefan Jonsson, ‘Building Eurafica: Reviving Colonialism through European Integration, 1920-60’ in Kalypso Nicolaïdis, Berny Sebe and Gabrielle Maas (eds), *Echoes of Empire: Identity, Memory, and Colonial Legacies* (I.B. Tauris 2015); Peo Hansen and Stefan Jonsson, *Eurafica: The Untold History of European Integration and Colonialism* (Bloomsbury Academic 2014); Peo Hansen and Stefan Jonsson, ‘Bringing Africa as a “Dowry to Europe”: European Integration and the Eurafican Project’ (2011) 13 *Interventions* 443; Peo Hansen and Stefan Jonsson, ‘Imperial Origins of European Integration and the Case of Eurafica: A Reply to Gary Marks’ “Europe and Its Empires”’, (2012) 50 *JCMS* 1028; D Custos, ‘Implications of the European Integration for the Overseas’ in D Kochenov (ed), *EU Law of the Overseas* (Kluwer Law International 2011) 91.

the European metropolises. The sovereign territories of the majority of the founding Member States of the Union have shrunk in the most radical fashion.<sup>61</sup>

Turning to Europe *proper*, a simple glance at the statehood of the current Member States suffices to make a basic point: mutations of statehood are responsible for the creation / consolidation of a number of the Member States of the EU, from the decolonization context spurring Malta and Cyprus into existence to the regaining of statehood by the Baltic States,<sup>62</sup> the split between the Czech and the Slovak Republics,<sup>63</sup> and the articulation of Slovenia and Croatia, as well as the united Germany, following the incorporation of the German Democratic Republic (DDR) and Berlin (West) into the Federal Republic,<sup>64</sup> and France, with Algeria leaving. Crucially, the EU, as well as its individual Member States, played an important role in bringing about such mutations of statehood not only with regard to the entities which came to be

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<sup>61</sup> Germany, of course, is the most radical counter-example: Treaty on the Establishment of German Unity art. 1, Aug. 31, 1990, 30 I.L.M. 457 (1991); Michael Bothe, 'The German Experience to Meet the Challenges of Reunification' in Alfred E. Kellerman and others (eds), *EU Enlargement: The Constitutional Impact at EU and National Level* (Asser 2011); Eberhard Grabitz, 'L'unité allemande et l'intégration européenne' (1991) 27 Cahiers de Droit Européen 3; Jean-Paul Jacqué, 'L'unification de l'Allemagne et la Communauté européenne' (1990) 94 Revue générale de droit internationale public 997.

<sup>62</sup> For a meticulous analysis, see Peter Van Elsuwege, *From Soviet Republics to EU Member States* (Martinus Nijhoff 2008). See also: Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia – Past, Present and Future as Defined by International Law* (Martinus Nijhoff 2005); Aleksejs Dimitrovs and Vadim Poleshchuk, 'Kontinuitet kak osnova gosudarstvennosti i ètnopolitiki v Latvii i Èstonii' in Vadim Poleshchuk and Valery Stepanov (eds), *Ètnopolitika stran Baltii* (Nauka 2013).

<sup>63</sup> For an overview of the legal implications of the dissolution of Czechoslovakia, see, Martin Palous, 'Questions of Czech Citizenship' in André Liebich and Daniel Warner with Jasna Dragovic (eds), *Citizenship East and West* (Routledge 1995) 142. Specifically on the issues of citizenship: D. Kochenov, 'EU Influence on the Citizenship Policies of the Candidate Countries: The Case of the Roma Exclusion in the Czech Republic', 3 JCER 2007, 124. For the general assessment of secessions in the context of the East-European eruption of state-making, see, Cass R. Sunstein, 'Constitutionalism and Secession' (1991) 58 University of Chicago Law Review 633.

<sup>64</sup> RW Piotrowicz, 'The Status of Germany in International Law: Deutschland über Deutschland?' (1989) 38 International and Comparative Law Quarterly 609.

Member States,<sup>65</sup> but also other countries, including loose protectorates that the EU has created.<sup>66</sup>

Splitting up of the colonial empires, besides triggering the creation of new states,<sup>67</sup> produced large numbers of foreigners deprived of EU-level rights out of full citizens able to benefit from what European integration had to offer.<sup>68</sup> The developments here were not straight-forward. Some of the newly-emerging foreigners lost EU citizenship<sup>69</sup> even without losing their nationality of a Member State *sensu lato*, as was the case with Mrs Kaur, whose Member State nationality was considered by the Court as not good enough to consider her an EU citizen.<sup>70</sup> Others lost all the rights without losing the status of

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<sup>65</sup> Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008).

<sup>66</sup> On the role of the EU in Kosovo see: Wolfgang Koeth, 'State Building without a State: The EU's Dilemma in Defining Its Relations with Kosovo' (2010) 15 *European Foreign Affairs Review* 227; Stephen Rozée, 'Order-Maintenance in Kosovo: The EU as an Increasingly Comprehensive Police Actor?' (2015) 20 *European Foreign Affairs Review* 97; Spyros Economides and James Ker-Lindsay, 'Forging EU Policy Unity from Diversity: The "Unique Case" of the Kosovo Status Talks' (2010) 15 *European Foreign Affairs Review* 495. For Bosnia see: Anze Voh Bostic, 'The Role of the European Union's Expert Assistance in the Process of Peace-Building: The Case of Bosnia and Herzegovina' (2010) 15 *European Foreign Affairs Review* 209; Milada Anna Vachudova, 'The Thieves of Bosnia: The Complicated Legacy of the Dayton Peace Accords' (2014) *Foreign Affairs*. Available at < <https://www.foreignaffairs.com/articles/europe/2014-02-24/thieves-bosnia>> (last visited 28-09-2015).

<sup>67</sup> Poul Kjær, *Constitutionalism in the Global Realm: A Sociological Approach* (Routledge 2014).

<sup>68</sup> Similarly, but following strictly territorial logic, former colonies graduating into statehood fell outwith the scope of European human rights instruments: A Hallo de Wolf, 'The Application of Human Rights Treaties in Overseas Countries and Territories' in D Kochenov (ed), *EU Law of the Overseas* (Kluwer Law International 2011).

<sup>69</sup> Rather than EU citizenship *sensu stricto*, what was at stake, was its precursor status, making part of the 'informal resources of the *acquis*' (A. Wiener, *'European' Citizenship Practice – Building Institutions of a Non-State* (Boulder, CO: Westview Press, 1998). This status was 'nationals of the Member States for the purposes of Community law' and predated the formal introduction of EU citizenship at Maastricht. The ECJ could distinguish between the two, by making EU citizenship more inclusive through depriving the Member States of the possibility they enjoyed in the pre-citizenship legal context to limit its scope via unilateral declarations – a practice much criticized in the academic literature of the day: R. Plender, 'An Incipient Form of European Citizenship' in F. Jacobs (ed.), *EU Law and the Individual* (Amsterdam: North Holland, 1976). The ECJ has not done this, however, tacitly reaffirming the legality of the unilateral British declarations on the scope of UK nationality for the purposes of community law and potentially opening the door for further such limitations of the term 'nationals' in Article 9 TEU: Case C-192/99, *Manjit Kaur* [2001] ECR. I-1237.

<sup>70</sup> Case C-192/99, *Manjit Kaur* [2001] ECR. I-1237. For a detailed discussion of this issue, see, e.g., D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' 15 *Columbia J. Eur. L.*, 2009, 169, at 186–190.

citizenship due to the racist immigration policies adopted by the Member States of the EU,<sup>71</sup> or, on the contrary, did not lose any EU rights at all, while *de jure* losing EU citizenship, as is the case with Færøe islanders (or its precursor status).

Numerous key EU citizenship cases deal with the persons, who, having enjoyed full entitlements to supranational rights since their birth, lost those overnight, as ‘their’ country became independent of a Member State, thus depriving them of the ‘legal heritage’<sup>72</sup> connection with the EU. Looking neat in legal literature, such cases often feed on human tragedy, separated families, and sadness: *Morson and Jhanjan* would be a case in point: a failed attempt to invoke EU law to secure family reunification between the individuals who all used to be Member State nationals a short while before, thus free of border controls, their situation changing radically with the independence of Suriname.<sup>73</sup>

The ECJ’s and ECHR’s approaches to the personal histories of EU citizenship (or a predecessor status) are drastically different.<sup>74</sup> For the ECt.HR your past at times lingers on as (possibly) legally relevant, like the former Netherlands nationality of ‘an illegal migrant’ from Suriname, residing with her Dutch family in the Netherlands in the case of *Jeunesse v. The Netherlands*.<sup>75</sup> The ECJ –

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<sup>71</sup> Anthony Lester, Lord Lester of Herne Hill QC, Lecture, East African Asians Versus the United Kingdom: The Inside Story (Oct. 23, 2003), available at <http://www.blackstonechambers.com/document.rm?id=73>.

<sup>72</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1.

<sup>73</sup> Joined cases 35 and 36/82, *Morson and Jhanjan* [1982] ECR 3723.

<sup>74</sup> S. Adam and P. Van Elsuwege, ‘EU Citizenship and the European Federal Challenge through the Prism of Family Reunification’, in D. Kochenov (ed.), *EU Citizenship and Federalism, The Role of Rights*, Cambridge: CUP, 2016.

<sup>75</sup> E.g. ECt.HR *Jeunesse v. The Netherlands* Application no. 12738/10, 3 Oct. 2014; ECt.HR *Beldjoudi v. France* Application no. 12083/86, 26 March 1992. For an insightful comment on *Jeunesse* in the context of EU law, see, S. Adam and P. Van Elsuwege, ‘EU Citizenship and the European Federal Challenge through the Prism of Family Reunification’, in D. Kochenov (ed.), *EU Citizenship and Federalism, The Role of Rights*, Cambridge: CUP, 2016.

just as the Member State courts – would usually ignore such past, including past nationalities, entirely, declaring yesterday's citizens illegal aliens without a blink of an eye.<sup>76</sup> While legally correct, this approach is clearly problematic, especially in the context of the general move from 'the culture of authority' to the 'culture of justification'.<sup>77</sup> The global trend in law nowadays is seeing a *person* behind the impenetrable and simplistic legal façade of citizenship.<sup>78</sup> Seeing a person indispensably implies being capable of taking the personal history into account, not only the passport the person happens to be travelling on.

Two important lessons from the above emerge. Firstly, mutations of statehood are not exceptional – secessions from states have been a day-to-day reality in 20<sup>th</sup> century Europe and the story continues into the 21<sup>st</sup> century. In this context withdrawal from the EU will be but one example among many. Indeed, many of the secession examples are sad ones in essence, bringing about the quality of life and the level of security far below the time of the proclamation of statehood. Besides the 'normality' of secessions and territorial fluctuations as testified by their commonality and omnipresence, secondly, history teaches us also the lesson of flexibility of the legal arrangements in many of these cases. This fully includes citizenship arrangements. Although examples of territories leaving the sovereign ambit of the Member States and

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<sup>76</sup> There is a consensus in the literature that the ECJ does not have the most enviable record of the protection of the rights of EU citizens, particularly those who are in vulnerable position: N. Nic Shuibhne, '(Some of) The Kids Are All Right: Comment on *McCarthy* and *Dereci*', 49 CMLRev., 2012, 349; E. Spaventa 'Earned Citizenship – Understanding Union Citizenship through Its Scope', in D. Kochenov (ed.), *EU Citizenship and Federalism, The Role of Rights*, Cambridge: CUP, 2016; C. O'Brien, 'Union Citizenship and Disability', in D. Kochenov (ed.), *EU Citizenship and Federalism, The Role of Rights*, Cambridge: CUP, 2016.

<sup>77</sup> M. Cohen-Eliya and I. Porat, *Proportionality and Constitutional Culture*, Cambridge: CUP, 2013. See also Tully, James, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: CUP, 1995 (on the inherent problems of constitutionalism in the context of diversity).

<sup>78</sup> L. Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 *International Journal of Constitutional Law* 9; L. Azoulai, 'L'autonomie de l'individu européen et la question du statut' (2013) *EUI LAW Working Paper* 2013/14.



withdrawing from the realm of (potential) application of EU law are numerous, not a single clear-cut example of a state withdrawing from the Union has been recorded. It is good news, however, thus such an example is entirely unnecessary to come to a definitive conclusion of what will happen with the EU citizenship of the nationals of the withdrawing state. This status will simply expire and cease to exist for them. No persuasive argument exists to allow this legal status to function as a legal pretext to deprive Article 50 TEU of *effet utile* besides depriving the people of the withdrawing Member State of a possibility to decide, by democratic means, that they do not want EU membership anymore. EU citizenship will go with the whole package. Withdrawal means leaving the ambit of the law of the Union and in this sense it will be no different from British Honduras leaving the UK or Java leaving the Netherlands.

### 4. Political dilemmas

Even though EU citizenship clearly cannot play a distinct role in the context of the practical application of Article 50 TEU, by providing legal argument against withdrawals resulting in the abolition of EU citizenship rights for the nationals of the withdrawing state, the considerations related to the supranational rights and status are bound to play an important role in the context of the withdrawal negotiations. While EU's history of dealing with citizenship and territory issues in the context of the deterioration of the colonial empires and the transformation of the Balkans as well as the Central and Eastern European countries show that the Union can be very flexible in trying to accommodate the specificity of the particular territories of its Member States, the context of the withdrawal negotiations could prove

somewhat different from the previous practice. This difference is due to the fact that EU citizenship is clearly *not* an autonomous status at the level of acquisition, numerous scholarly <sup>79</sup> and institutional <sup>80</sup> calls for change notwithstanding. Not being able to confer autonomous supranational level citizenship, the EU's room for manoeuvre in dealing with the wholesale loss of rights by the citizens of the withdrawing Member State is somewhat restrained, unless the Member States would be willing to change the Treaties to allow for an exceptional provision of full EU citizenship, or merely some rights associated therewith, for the nationals of the withdrawing state. The likelihood of this is nihil, however, as the reasons for such an action on the part of the *Herren der Verträge* are not crystal clear. An alternative, and more general reform, implying turning EU citizenship into a truly independent status at the level of acquisition and loss is probably not politically viable at the moment, just as it was not since the Treaty of Maastricht.

In a situation where such an independent supranational level status could be created, an array of legal options at hand would be significant, including, but not limited to four main options, tailored to ensure that the citizens of the withdrawing state do not lose supranational rights. This contribution is not the place to advocate for the creation of an autonomous status of supranational belonging. We should realize, however, that however improbable, it would be too much to say that it is legally or politically impossible.

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<sup>79</sup> E.g. D Kostakopoulou, 'European Union Citizenship and Member State Nationality: Updating or Upgrading the Link' in J Shaw (ed), *Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?* (EUI Robert Schuman Centre for Advanced Studies Paper No 62 (2011)).

<sup>80</sup> E.g., most recently, European Economic and Social Committee, 'Opinion on a More Inclusive Citizenship Open to Immigrants (own-initiative opinion)', Rapporteur Pariza Castaños, SOC/479, 16 October 2013: 'The Committee proposes that, in future, when the EU undertakes a new report of the Treaty (TFEU), it amends Article 20 so that third-country nationals who have stable, long-term resident status can also become EU citizens' (para. 1.11).



1. Dual nationality of the EU and the withdrawing state. With the global rise of multiple nationality toleration, where dual nationality is not frowned upon in the majority of jurisdictions around the world, a combination of two nationalities could be the way forward, ensured by a legal arrangement that will allow independent EU citizenship not to expire for the nationals of the withdrawing Member State upon the departure of such state from the Union. Given that EU citizenship is not an independent status, however, this option is not applicable, without a serious reform of the law, unless one (or several) of the Member States wishes to naturalise all the citizens of the withdrawing state, which could be highly problematic from the point of view of EU law as discussed above;
2. Common nationality shared by the EU and the withdrawing state. This is an advanced variation on the previous option, the plausibility of which is weak for the same reason, which does not make this option impossible. In fact, plenty of entities in the world share some variation of an arrangement of this kind. It is particularly favoured by the semi-independent entities, which the UK will most likely end-up being as an outcome of the secession negotiations, given the high costs or a total refusal to associate itself with the EU *acquis* and the internal market. All the Arubans are in fact Dutch citizens, just as all the Niueans are New Zealanders.
3. The elevation of the nationality of the withdrawing state to the rank of an associated nationality of the EU. Examples of associated states offering own nationality to their citizens in a legal context where that nationality in fact equals, in a number of core respects, the main nationality with which the state is associated are rather common. Federated States of

Micronesia nationality, in one example, entitles the bearer to home treatment and non-discrimination in the US, with which state the Federated States are associated.<sup>81</sup> Associated nationalities are usually acts of benevolence on the part of more potent states. In the context of the EU the recognition of the nationality of the withdrawing state as an associated nationality would most likely require a Treaty change, or at least a common declaration by the remaining Member States. Given that the majority of rights enjoyed by EU citizens, including, most importantly, free movement, are territorial in nature, and, knowing that the territory of the withdrawing state will not be part of EU territory for the purposes of such rights, it would be unclear why the Member States of the EU should take any such benevolent steps knowing that the territory of the withdrawing Member State will be off limits for EU citizens. This is an obvious opportunity to be used, however, since the UK government can obviously extend rights to EU nationals similarly to how it treats the citizens of the Republic of Ireland.

4. Lastly, and this option does not imply the creation of a truly independent EU citizenship status, an international agreement can be concluded between the withdrawing state and the EU and its Member States aiming at ensuring that free movement rights enjoyed by the nationals of all the parties involved, continue beyond the point of the state's withdrawal. This option, which could be part of a larger EEA-like framework created by the parties, will however clearly undermine the effect of withdrawal and could therefore not be fully politically viable, unless the withdrawal is officially triggered by the reasons unrelated to the issues of free

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<sup>81</sup> T. Lam Dang, 'Relation associative: les États Fédérés de Micronésie: les spécificités de l'association', in Jean-Yves Faberon et al. (eds.), *Destins des collectivités politiques d'Océanie*, Vol 1, Marseille: Presses Universitaires d'Aix-Marseille, 2011.

movement and the management of the migration flows within the EU, which is not the case in the UK, in one crucial example.

The four options above will most likely not be politically viable both in practice (as they will require a Treaty change, or negotiating agreements *de facto* cancelling the effects of withdrawal from the EU) and in theory (as they assume that citizens voting for withdrawal want to remain EU citizens nevertheless – even if not in a name). In other words, these options will, in all likelihood, not be acceptable to the parties.

This does not change the fact that plenty of outstanding problems caused by a Member State's withdrawal from the EU will need to be solved nevertheless. The solutions to such problems will necessarily need to imply taking the wish of the people of the withdrawing state precisely to withdraw seriously. The most viable among these, could be the negotiation of bilateral free movement of persons agreements between the withdrawing state and a handful of Member States. Such agreements will, however, approach member state nationals in their *national* status capacity and will thus not be concerned with EU citizenship as such.

### 5. Post-secession free movement bilateralism?

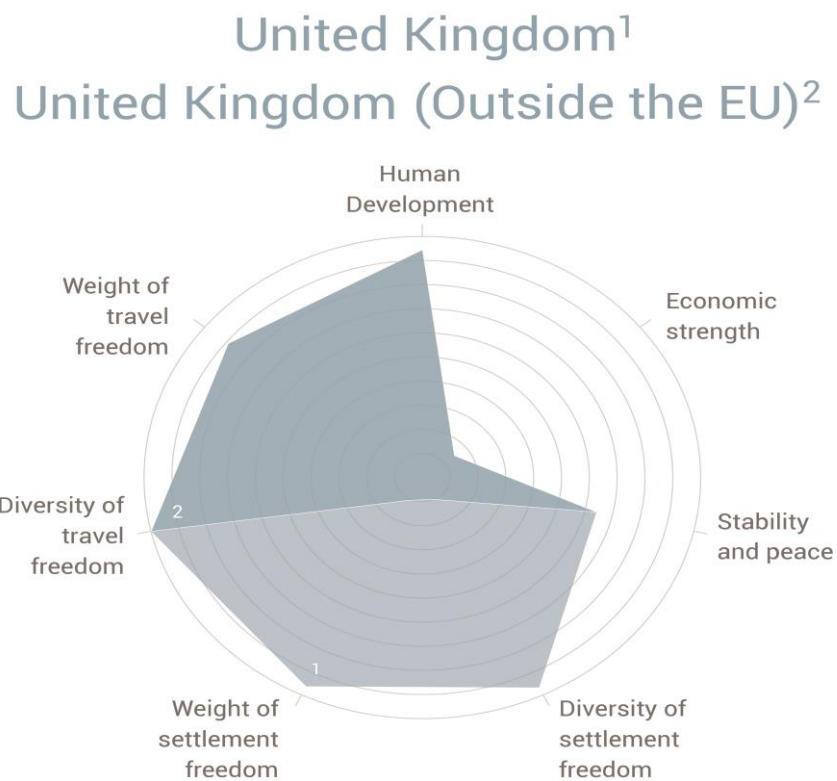
Any withdrawal from the EU offers its authors and their compatriots an uneasy dilemma. Any full withdrawal automatically leads to a radical downgrading in the value of the nationality of the withdrawing state approached through the prism of the amount and the scale of rights such a

nationality is associated with. The amount of difficulty (and, possibly, human suffering) such an arrangement can cause is very difficult to ignore in the context of the negotiations. Yet, no EU citizenship arguments as such could change the fate of the negotiating outcomes, as Article 50 TEU cannot be interpreted *contra legem*. Consequently, should Britain leave the EU, for instance, every British citizen in France, Poland, Spain and elsewhere in the Union (and there are hundreds of thousands of them) will instantly see a rights' downgrade to the level of Indian, Chilean or Russian citizens residing in the Union. Should the negotiations go well, such a downgrade could be mitigated somewhat on a range from ensuring that UK citizens' standing in the EU is equal to Moroccans in the Union, to Turks in the Union, the Swiss, and, finally to the EEA nationals: Norwegians, Liechtensteiners and Icelanders.<sup>82</sup> Only the last two categories bring with them a right of free movement. Crucially however, every additional grade on this scale, means, – and this is the dilemma – that the 'withdrawal' is more and more elusive. Let us not forget that in all likelihood much more EU law applies in Iceland or Norway today than in the UK. In this context the political price of securing the privileges for own citizens following the withdrawal will most likely be very high. There is no reason at all to expect of the Union an altruistic attitude towards the (former) Member States busy ruining the European family as it stands today. This being said, tailored mutually-beneficial bilateral free movement of persons-arrangements between the withdrawing state and the Union as a whole or even a handful of other Member States could provide a realistic way forward in an unfortunate context where a decision to withdraw is taken and cannot be rolled back.

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<sup>82</sup> For the analysis of the exact rights of each of the provided categories of foreigners in the EU, see, e.g., D. Kochenov and M. van den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU', in D. Thym and M. Zoetewij Turhan (eds.), *Degrees of Free Movement and Citizenship*, Leiden: Brill-Nijhoff, 2015.

**Figure 1**<sup>83</sup>



<sup>83</sup> The calculations used to produce the figure assume that the UK's withdrawal from the EU terminates UK nationals' supranational rights and follows the methodology of the *Quality of Nationality Index* (2016), *op cit*.

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